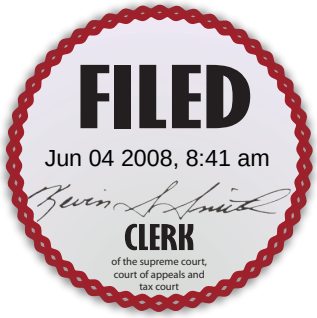

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IN THE COURT OF APPEALS OF INDIANA

WILLIAM BOLTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 33A01-0711-CR-524
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Mary G. Willis, Judge
Cause No. 33C01-0606-FA-4

June 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

William Bolton appeals his status as an habitual substance offender.[1] Bolton raises one issue, which we revise and restate as whether the evidence is sufficient to sustain the jury's finding that Bolton is an habitual substance offender. We affirm.

The relevant facts follow. On June 22, 2006, Bolton delivered 0.77 grams of cocaine to a confidential informant in exchange for $100. On June 29, 2006, Bolton delivered 0.52 grams of cocaine to a confidential informant in exchange for $100. The State charged Bolton with two counts of dealing in cocaine as class B felonies[2] and requested enhanced sentencing of Bolton as an habitual substance offender.[3]

After a jury trial, Bolton was found guilty as charged. During the habitual substance offender phase of the trial, the State introduced evidence that, in 1990, Bolton committed the offense of operating a vehicle while intoxicated ("OWI") as a class A misdemeanor,[4] which was enhanced to a class D felony.[5] Bolton was convicted and

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[1] Ind. Code § 35-50-2-10 (Supp. 2005) (subsequently amended by Pub. L. No. 1-2006, § 551 (eff. July 1, 2006)).

[2] Ind. Code § 35-48-4-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 22 (eff. July 1, 2006)).

[3] The State initially charged Bolton with: (1) Count I, dealing in cocaine as a class A felony; (2) Count II, dealing in cocaine as a class A felony; (3) Count III, dealing in cocaine as a class A felony; (4) Count IV, possession of cocaine as a class A felony; (5) Count V, dealing in a schedule II controlled substance as a class A felony; (6) Count VI, dealing in a schedule II controlled substance as a class A felony; (7) Count VII, dealing in a schedule II controlled substance as a class A felony; and (8) Count VIII, maintaining a common nuisance as a class D felony. The State later moved to dismiss Counts I, IV, V, VI, VII, and VIII with prejudice, which the trial court granted. The State then filed an amended information changing Counts II and III to dealing in cocaine as class B felonies.

[4] Ind. Code § 9-11-2-2 (repealed by Pub. L. No. 2-1991, § 109 (eff. July 1, 1991)).

[5] Ind. Code § 9-11-2-3 (repealed by Pub. L. No. 2-1991, § 109 (eff. July 1, 1991)).

sentenced for this offense in 1993. The State also introduced evidence that, in 1996, Bolton was convicted of operating a vehicle while intoxicated as a class D felony[6] and possession of marijuana as a class A misdemeanor.[7] The jury found Bolton to be an habitual substance offender.

The trial court sentenced Bolton to sixteen years each for the class B felonies and ordered that the sentences be served concurrently. The trial court also enhanced Bolton's sentence by an additional six years due to the habitual substance offender enhancement.

The sole issue is whether the evidence is sufficient to sustain the jury's finding that Bolton is an habitual substance offender. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

Ind. Code § 35-50-2-10(e) (Supp. 2005) provides that "[a] person is a habitual substance offender if the jury . . . finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated substance offense

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[6] Ind. Code § 9-30-5-3 (1996) (subsequently amended by Pub. L. No. 175-2001, § 7 (eff. July 1, 2001); Pub. L. No. 243-2001, § 1 (eff. July 1, 2001); Pub. L. No. 291-2001, § 222 (eff. July 1, 2001); Pub. L. No. 82-2004, § 1 (eff. July 1, 2004)).

[7] Ind. Code § 35-48-4-11 (2004).

convictions." The statute defines a "substance offense" as "a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime. The term includes an offense under IC 9-30-5 and an offense under IC 9-11-2 (before its repeal)." Ind. Code § 35-50-2-10(a)(2) (Supp. 2005). Thus, to establish that Bolton was an habitual substance offender, the State was required to prove beyond a reasonable doubt that Bolton had been previously convicted of two prior unrelated substance offense convictions. Bolton does not dispute the 1996 conviction. Rather, Bolton appears to argue that: (A) the trial court imposed a double enhancement, which is improper under Freeman v. State, 658 N.E.2d 68 (Ind. 1995), and Devore v. State, 657 N.E.2d 740 (Ind. 1995); and (B) the use of his 1993 conviction as a predicate offense violated the ex post facto protections of both the federal and state constitutions.

A. Double Enhancement

Bolton appears to argue that the trial court erred by imposing a double enhancement, which is improper under Freeman and Devore. Freeman and Devore held that an underlying conviction and sentence under a progressive penalty statute[8] could not be further increased under the specialized habitual offender statute for habitual substance

[8] A progressive penalty statute is one in which "the seriousness of a particular charge (with a correspondingly more severe sentence) can be elevated if the person charged has previously been convicted of a particular offense." State v. Downey, 770 N.E.2d 794, 796 (Ind. 2002).

offenders.[9] See Freeman, 658 N.E.2d at 70-71; Devore, 657 N.E.2d at 741-742. For example, in Freeman, the trial court enhanced the defendant's operating while intoxicated conviction to a felony based on a prior drunken driving conviction. 658 N.E.2d at 68-69. Then the trial court enhanced his sentence by finding him to be an habitual substance offender. Id. at 69. The Indiana Supreme Court held that the Legislature did not intend the habitual substance offender enhancement to apply to OWI convictions and the second enhancement was improper. See id. at 69-71.

Bolton argues that his 1993 conviction was "once enhanced already under the OWI offender statute" and "was not available for second enhancement under the habitual substance offender statute." Appellant's Brief at 12. However, Bolton's 1993 conviction is not the offense that is being enhanced. Rather, here, the offenses at issue are convictions for dealing in cocaine as class B felonies. Dealing in cocaine as a class B felony is governed by Ind. Code § 35-48-4-1, which does not provide for enhancement based on prior offenses in a progressive penalty statute scheme. Thus, Bolton was not charged under a progressive penalty statute, Bolton did not suffer a double enhancement, and Freeman and Devore are not applicable. See Haymaker v. State, 667 N.E.2d 1113,

[9] We note that "at least three felonies are involved in an habitual offender adjudication--two 'prior unrelated felony convictions,' and a third felony to which the habitual offender finding is 'attached.'" Puckett v. State, 843 N.E.2d 959, 962 (Ind. Ct. App. 2006) (quoting Townsend v. State, 793 N.E.2d 1092, 1097 n.4 (Ind. Ct. App. 2003), trans. denied). "In this context, the third, or current, offense is referred to as the 'underlying' offense while the prior unrelated felony convictions are known as the 'predicate' or 'prior' felonies." Id. at 963 (quoting Townsend, 793 N.E.2d at 1097 n.4).

1115 (Ind. 1996) (holding that use of the general habitual offender statute would not result in double enhancement when the current convictions were not already enhanced by a specific habitual offender scheme).

Moreover, after Freeman and Devore, "the Legislature modified the habitual substance offender statute to provide that prior convictions for operating vehicles while intoxicated, including those where the charge had been elevated because of a prior conviction, could serve as predicate offenses for habitual substance offender enhancements." State v. Downey, 770 N.E.2d 794, 797 (Ind. 2002). Specifically, the Legislature added the second sentence to the following statutory definition of a substance offense:

> "Substance offense" means a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime. *The term includes an offense under IC 9-30-5 and an offense under IC 9-11-2 (before its repeal).*

Ind. Code § 35-50-2-10(a)(2) (emphasis added). See Pub. L. No. 97-1996, § 5; and Pub. L. No. 96-1996, § 8 (eff. July 1, 1996).

B. Ex Post Facto

Bolton also appears to argue that his 1993 conviction could not be used as a predicate offense because it would violate the ex post facto protections of both the federal and state constitutions.[10] Specifically, Bolton argues that "ex post facto requires that the

[10] Bolton acknowledges that he did not object to the use of the 1993 conviction on ex post facto grounds. We will address this issue because the ex post facto application of a criminal statute is

1996 amendment which expanded the definition of prior convictions to include D felony OWIs may not be applied retroactively." Appellant's Brief at 11. Bolton concludes that "if the defendant committed the underlying D felony OWI prior to the 1996 amendment, that OWI may not be used to support the [habitual substance offender enhancement]." Id. Bolton relies on Settle v. State, 709 N.E.2d 34 (Ind. Ct. App. 1999) to argue that "[o]nly D felony OWIs committed after July 1, 1996, can be used to support an Habitual Substance Offender Enhancement." Id. We recently rejected this same argument in King v. State, 848 N.E.2d 305, 309 (Ind. Ct. App. 2006), in which we distinguished Settle and held that the defendant's 1993 OWI as a class A misdemeanor was a substance offense under Ind. Code § 35-50-2-10(a)(2) and could be used as a predicate offense to support an habitual substance offender determination.

We conclude that the State presented evidence of probative value from which the jury could have found Bolton to be an habitual substance offender beyond a reasonable doubt. See, e.g., Tyson v. State, 766 N.E.2d 715, 718 (Ind. 2002) (holding that there was sufficient evidence from which a fact-finder could find beyond a reasonable doubt that the defendant was convicted of two separate and unrelated felonies).

For the foregoing reasons, we affirm Bolton's status as an habitual offender.

Affirmed.

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fundamental error. See Settle v. State, 709 N.E.2d 34, 35 n.3 (Ind. Ct. App. 1999) (addressing the defendant's challenge to the ex post facto application of the habitual substance offender statute despite the defendant's failure to raise the issue at trial) (relying on Mudd v. State, 483 N.E.2d 782, 785 (Ind. Ct.

DARDEN, J. and NAJAM, J. concur

App. 1985)).